Tulsa Law Review

Volume 33
Issue 2 *Legal Issues for Nonprofits Symposium*

Winter 1997

Title VII and the Federal Arbitration Act

Monica L. Goodman

TULSA LAW JOURNAL

Volume 33 Winter 1997 Number 2

COMMENTS

TITLE VII AND THE FEDERAL ARBITRATION ACT

I. INTRODUCTION

Since the enactment of the Federal Arbitration Act ("FAA"),[1] arbitration has become a means to settle disputes in a speedy, efficient, and inexpensive manner.[2] However, controversy has arisen in attempting to reconcile the FAA with Title VII of the Civil Rights Act.[3] The legislative history behind the FAA and Title VII are in direct conflict.[4] Federal substantive law requires "a court to resolve any doubts regarding arbitrability in favor of arbitration."[5] It is also well-established that Congress intended the courts to "exercise final responsibility for the enforcement of Title VII."[6] As such, the purposes of the two Acts are in direct opposition.

Two Supreme Court cases have discussed the issue of arbitration dealing

1. 9 U.S.C. § 1-14, 201-08 (1987).

2. The FAA was enacted in an attempt to relieve some of the congestion in the court system while at the same time providing a means to provide a quick, inexpensive, and just resolution to the claims of litigants. *See* United Nuclear Corp. v. Gen. Atomic Co., 597 P.2d 290 (N. Mex. 1979), *cert. denied*, 444 U.S. 911 (1979). *See also* Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1488 (10th Cir. 1994) (citing Peterson v. Shearson/Am. Express, 849 F.2d 464, 465 (10th Cir. 1988)), which stated "there is a strong federal policy encouraging the expeditious and inexpensive resolution of disputes through arbitration." *Id.*

3. 42 U.S.C. § 2000e-1 to 2000e-17 (1994).

4. *See* Mark T. Conlon, Comment, *Employment Law—Arbitration Not a Prerequisite to a Federal Court*, 24 SUFFOLK U.L. REV. 271 (1990).

5. *Id.* at 273 (referring to Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (Arbitration Act establishes body of federal substantive law favoring arbitration.)). In addition, "[i]t has been held that the Federal Arbitration Act evidences a strong federal policy favoring the enforcement of arbitration agreements." *United Nuclear Corp.*, 597 P.2d at 299.

6. Conlon, *supra* note 4, at 277. Additionally, the Court in *Alexander v. Gardner-Denver Co.*, stated:

> Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.

415 U.S. 36, 48-49 (1973).

with statutory claims in employment cases.[7] Although *Alexander v. Gardner-Denver Co.*[8] dealt specifically with a Title VII claim, the main issue centered around the arbitration of the claim in the context of a collective bargaining agreement.[9] In addition, this case was not decided under the FAA.[10] Accordingly, after this case it was unclear whether arbitration of a Title VII claim would be enforceable absent a collective bargaining agreement.[11] The second case, *Gilmer v. Interstate/Johnson Lane Corp.*, decided under the FAA,[12] held an Age Discrimination in Employment ("ADEA") claim was subject to mandatory arbitration.[13] Although this case has been applied to numerous Title VII cases,[14] *Gilmer* can be distinguished from Title VII cases because the legislative history of Title VII reveals a policy against binding arbitration.[15] The legislative history behind the ADEA reveals no such policy against binding arbitration.[16] The policy regarding binding arbitration in Title VII cases, however, is in direct conflict with the FAA. The FAA, 9 U.S.C. Section 1 *et seq.*, directs the Courts to "rigorously enforce agreements to arbitrate."[17]

---

7. *See id.* at 36; Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

8. *Alexander*, 415 U.S. 36.

9. *See id.* at 39.

10. *See* Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77, 79 (1996).

11. Brian K. Van Engen, Note, *Post-Gilmer Developments in Mandatory Arbitration: The Expansion of Mandatory Arbitration for Statutory Claims and the Congressional Effort to Reverse the Trend*, 21 J. CORP. L. 391, 398 (1996).

12. Malin, *supra* note 10, at 79.

13. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991).

14. *See e.g.*, Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1487 (10th Cir. 1994); Rojas v. TK Communications Inc.,87 F.3d 745 (5th Cir. 1996).

15. H.R. REP. No. 102-40(I) at 97 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 635 states as follows:

> Section 216 encourages the use of alternative means of dispute resolution to resolve disputes arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 621 et seq., where appropriate and to the extent authorized by law. These methods include settlement negotiations, conciliation, facilitation, mediation, factfinding, mini-trials and arbitration. This section is intended to encourage alternative means of dispute resolution that are already authorized by law.
>
> The Committee emphasizes, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII.

H.R. REP. NO. 102-40 (I).

16. Although Gilmer raised numerous arguments in an attempt to persuade the Court that Congress intended to "preclude a waiver of judicial remedies for the statutory rights at issue," he was unable to do so. Malin, *supra* note 10, at 80 (quoting *Mitsubishi*, 473 U.S. at 628). Even though the Court agreed the ADEA furthered important public policies, it "concluded that there was no tension between those policies and enforcement of the agreement to arbitrate as long as Gilmer could vindicate his statutory rights in the arbitral forum." *Id.*

17. Lang v. Burlington N. R.R. Co., 835 F. Supp. 1104, 1105 (D.Minn. 1993) (quoting Shearson/Am. Express, Inc. v. McMahom, 482 U.S. 220, 226) (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1983)); *see also* Rodriguez de Quijas v. Shearson/Am. Express, 490 U.S. 477, 482-84; Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). The Act also states arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or equity for the revocation of any contract." 9 U.S.C. § 2 (1987).

A minority of the courts and the Equal Employment Opportunity Commission ("EEOC") have attempted to state that employment contracts are adhesion contracts and would be invalid under 9 U.S.C. § 2 because the employee has no bargaining power. *See, e.g.*, EEOC v. River Oaks Imaging and Diagnostic, Case No. H-95-755 (D.C.S.D. Tex. 1995). In fact, in April 1995, the EEOC commissioners met to discuss the alternative dispute resolution conflicts. Although they were in favor of voluntary alternative dispute resolution, they

This Comment will distinguish and reconcile the case law and legislative intent behind Title VII[18] claims and the FAA offering a proposal as to various approaches should Title VII claims be subject to mandatory arbitration or should they not be subject to mandatory arbitration. This author believes they should be subject to mandatory arbitration as long as the claimant "knowingly" enters into the arbitration agreement.[19]

II. HISTORY

A. *Alexander v. Gardner-Denver Co.*

In this case, Petitioner, Harrell Alexander, Sr., an African American male, was hired by Gardner-Denver Company to perform maintenance work.[20] He was then promoted to a drill operator trainee.[21] Subsequently, he was discharged from his position for "producing too many defective or unusable parts that had to be scrapped."[22] He brought a grievance under a collective bargaining agreement for unjust discharge[23] as well as a Title VII action in federal court for racial discrimination.[24] The company argued the Title VII action was

---

included the following:

1. The commission is opposed to arbitration agreements that mandate binding arbitration of employment discrimination disputes as a condition of initial or continued employment, and
2. The commission will receive and process charges regardless of the existence of any such mandatory arbitration agreement and regardless of the existence of any employer-sponsored ADR program.

Can Employers Mandate Arbitration of Discrimination Claims? The EEOC Says "No", OKLA. EMP. LAW LETTER (Doerner, Saunders, Daniel & Anderson, Tulsa, Okla.), Oct. 1995, at 1.

However, many of the courts have determined that arbitration agreements are not adhesion contracts, nor are they unfair to the employee. *See, e.g.*, Continental Airlines, Inc. v. Mason, 87 F.3d 1318 (9th Cir. 1996), holding an arbitration procedure in the employee handbook is not an unconscionable adhesion contract. *See also, Gilmer*, holding challenges to the adequacy of arbitration procedures are insufficient to preclude arbitration. Thus, the court did not feel arbitration was unfair. *See Gilmer*, 500 U.S. at 20.

18. Although this paper discusses the controversy in the context of Title VII cases, the same controversy exists under the American With Disabilities Act ("ADA"). The ADA has substantially the same language in its legislative history as does Title VII. *See* H.R. REP. NO. 101-485(I) at 76-77 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 499-500:

> This section encourages the use of alternative means of dispute resolution where appropriate and to the extent authorized by law. These methods include settlement negotiations, conciliation, facilitation, mediation, factfinding, mini-trials and arbitration.
>
> This amendment was adopted to encourage alternative means of dispute resolution that are already authorized by law. The Committee wishes to emphasize, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by this Act. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of this Act. This view is consistent with the Supreme Court's interpretation of title VII of the Civil Rights Act of 1964, whose remedial provisions are incorporated by reference in title I. The Committee believes that the approach articulated by the Supreme Court in *Alexander v. Gardner-Denver Co.* applies equally to the ADA and does not intend that the inclusion of Section 513 be used to preclude rights and remedies that would otherwise be available to persons with disabilities.

Id.

19. *See infra* notes 192-96 and accompanying text.
20. Alexander v. Gardner-Denver Co., 415 U.S. 36, 38 (1973).
21. *See id.*
22. *See id.*
23. *See id at 39.*
24. *See id.* at 42.

subject to compulsory arbitration.[25] The employee contended he had a right to have his claim adjudicated in a judicial forum.[26]

The district court granted Gardner-Denver Company's motion for summary judgment and dismissed the complaint.[27] The district court determined the issue of racial discrimination had been raised during the arbitration and resolved adversely to petitioner.[28] Accordingly, the lower court held "that petitioner, having voluntarily elected to pursue his grievance to final arbitration under the nondiscrimination clause of the collective-bargaining agreement, was bound by the arbitral decision and thereby precluded from suing his employer under Title VII."[29] The Tenth Circuit Court of Appeals affirmed the district court's decision.[30]

The Supreme Court reversed the lower court's decision.[31] The main fact upon which the Court premised its decision was the existence of a collective bargaining agreement.[32] The Court gave several reasons why an arbitration clause could not be enforced in the context of a collective bargaining agreement in Title VII cases.[33] First, "the arbitrator . . . has no general authority to invoke public laws that conflict with the bargain between the parties."[34] Therefore, if the arbitrator looked outside the scope of the collective bargaining agreement to make his decision (i.e., to the statutes), he would be exceeding his scope of authority, and the award would not be enforceable.[35]

In addition, even if the collective bargaining agreement contained a provision including Title VII in its scope, it would still be invalid.[36] In coming to this result, the Court looked at the legislative intent behind Title VII[37] and stated: "Congress intended for federal courts to exercise final responsibility for Title VII; deferral to arbitral decisions would be inconsistent with that goal."[38] The Court also considered the waiver issue and differentiated the waiver of an individual's rights with that of the majority's rights.[39] A union bargains on behalf of the majority and, in doing so, could bargain away an individual's statutory rights if the majority would gain a benefit, i.e., higher wages or more benefits.[40] Title VII "concerns not majoritarian processes, but an individual's rights to equal employment opportunities."[41]

---

25. *See id.* at 43.
26. *See Id.* at 36.
27. *See id.* at 43.
28. *See id.*
29. *Id.*
30. Alexander v. Gardner-Denver Co., 466 F.2d 1209 (10th Cir. 1972).
31. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 43 (1973).
32. *See id.* at 49.
33. *See id.*
34. *Id.* at 53.
35. *See id.*
36. *See id.* at 56.
37. *See* H.R. REP. NO. 102-40(I) at 97 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 635.
38. *Alexander*, 415 U.S. at 56 (1973).
39. *See id.* at 51.
40. *See id.*
41. *Id.*

Aside from the collective bargaining agreement, the Court included strong language which left the impression that a Title VII case could not be subject to arbitration even if a collective bargaining agreement were not involved. The Court began by stating the provisions of Title VII "make plain that federal courts have been assigned plenary powers to secure compliance with Title VII."[42] The Court went on to assert "that there can be no prospective waiver of an employee's rights under Title VII."[43] As stated earlier, the Court also considered the intent of Congress and determined arbitration would be inconsistent with the goal of the federal courts having the final responsibility in the enforcement of Title VII.[44] Another factor the Court noted was that the arbitrator lacked expertise in the area of Title VII. The Court expounded by stating:

> Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.[45]

Obviously, the Court felt arbitrators were in no way qualified to determine disputes involving Title VII claims. However, in light of the Court's thoughts on arbitration, a key point to note about this case is that it was not decided under the FAA.[46] As will be discussed more fully below, the purpose of the FAA and the legislative history of Title VII are in direct conflict.[47]

B. Gilmer v. Interstate/Johnson Lane Corp.[48]

Gilmer was a securities representative.[49] As a condition of his employment, he was required to register with the New York Stock Exchange ("NYSE").[50] His agreement with the NYSE required that any dispute be subject to arbitration.[51] Gilmer was terminated at the age of 62.[52] Gilmer brought

---

42. *Id.* at 45.
43. *Id.* at 51.
44. *See id.* at 56.
45. *Id.* at 57.
46. *See* Malin, *supra* note 10, at 79. *See also,* Engen, *supra* note 11, at 398.
47. *See* H.R. REP. NO. 102-40(I)(1991).
48. The *Gilmer* case deals with an ADEA claim, not a Title VII claim. As noted in *Gilmer*, the ADEA has no legislative history which would "preclude enforcement of arbitration agreements." 500 U.S. 20, 24 (1991). As previously noted, Title VII has specific language in its legislative history which precludes binding arbitration. *See* H.R. REP. NO. 102-40(I). However, although the *Gilmer* case can definitely be distinguished from a case involving Title VII, numerous cases have relied on Gilmer's reasoning as support for the contention that arbitration clauses are enforceable in Title VII cases. *See e.g.,* Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994); Rojas v. TK Communications, Inc., 87 F.3d 745 (5th Cir. 1996). Accordingly, the *Gilmer* case will be discussed at length throughout this article.
49. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991).
50. *See id.*
51. *See id.* In his registration application he "'agree[d] to arbitrate any dispute, claim or controversy' arising between him and Interstate 'that is required to be arbitrated under the rules, constitutions or by-laws of the organization with which I register.'" *Id.* In this regard, NYSE Rule 347 "provides for arbitration of '[a]ny controversy between a registered representative and any member or member organization arising out of the

suit in federal court based on the ADEA.[53] In response, Interstate filed a motion to compel arbitration based upon Gilmer's registration application and the FAA.[54] Based on *Alexander,* the District Court denied Interstate's motion.[55] The Fourth Circuit reversed,[56] and the Supreme Court granted certiorari.

The *Gilmer* Court first considered the FAA in making its decision.[57] The FAA states:

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[58]

As *Gilmer* noted, "[t]hese provisions manifest a 'liberal federal policy favoring arbitration agreements.'"[59] Based on this liberal policy, the Court held it was clear "that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."[60]

Another issue discussed in dicta in this decision was based upon whether the FAA included employment agreements. If so, would the agreement in this case be an employment agreement excluded under the provisions of Section 1 of the FAA?[61] However, the Court did not address the issue of whether an employment agreement would fall within the parameters of Section 1 of the FAA, because it determined the agreement in question was not an employment contract, but rather a registration application with a securities commission.[62]

Since this decision, many commentators, as well as the EEOC, have argued employees are losing substantive rights through arbitration of statutory claims.[63] However, the *Gilmer* Court disagreed and stated "[b]y agreeing to

---

employment or termination of employment of such registered.'" *Id.*

52. *See id.*

53. *See id.* at 24.

54. *See id.*

55. *See Gilmer*, 500 U.S. at 24 (1991). The District Court concluded that "Congress intended to protect ADEA claimants from the waiver of a judicial forum." *Id.*

56. *See id.* The Fifth Circuit held "nothing in the text, legislative history, or underlying purposes of the ADEA indicat[ed] a congressional intent to preclude enforcement of arbitration agreements." *Id.* It should be noted that the legislative history of the ADEA and the legislative history of Title VII are clearly not the same. *See supra* note 15 and accompanying text.

57. *See Gilmer*, 500 U.S. at 24.

58. *Id.* at 24-25 (quoting 9 U.S.C. § 2 (1987)).

59. *Gilmer*, 500 U.S. at 25 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,460 U.S. 1, 24 (1983)).

60. *Id.* at 26.

61. In a footnote, the *Gilmer* Court noted that several *amici curiae* briefs had been filed contending the FAA does not apply to employment contracts. Section 1 of the FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1987). Although this argument has been hotly debated and will be discussed in detail later in this comment, the *Gilmer* Court held "it would be inappropriate to address the scope of the §1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment." *Gilmer*, 500 U.S. at 25 n.2 (1991). The Court stated that the agreement was a securities registration application, not an employment agreement. *Id.* at 36. However, the dissent disagreed. The dissent stated the FAA intended to exclude all employment contracts and found that this was an employment agreement. *Gilmer*, 500 U.S. at 38-39 (Stevens, J., dissenting).

62. *Gilmer*, 500 U.S. at 25 n.2.

63. *See* Cliff Palefsky, *The Founders Would Frown on Mandatory ADR, in* LITIGATING EMPLOYMENT

arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."[64] Many arguments were brought up by Gilmer in an effort to persuade the Court that he would lose rights if his dispute were arbitrated.[65] He argued arbitration panels are biased,[66] discovery in arbitration is more limited,[67] arbitration does not require written opinions,[68] arbitration procedures do not provide for broad equitable relief and class actions,[69] and there is "unequal bargaining between the employers and employees."[70]

The Court addressed each of Gilmer's contentions. First, the Court was not persuaded that the arbitrators would be biased in the arbitral forum.[71] However, in this specific instance the NYSE arbitration rules provide protection against biased panels.[72] In reference to Gilmer's discovery argument, the Court held he failed to show any more extensive discovery was required for an ADEA claim than other claims the Court had formerly held arbitrable.[73] However, again in this specific instance, the NYSE arbitration rules provide for extensive discovery procedures.[74] As to the lack of written opinions, the NYSE arbitration rules require a written opinion which is to be made available to the public.[75] The Court found Gilmer's argument that arbitration does not provide for equitable relief completely inaccurate.[76] The Court also found an arbitration of an individual's claim does not preclude class-wide action by the EEOC.[77] Although the Court agreed there may be unequal bargaining power between the employer and employee, it held "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."[78]

The *Gilmer* Court distinguished its opinion from *Alexander*. First, it pointed out that a collective bargaining agreement was involved in that case.[79] In

---

DISCRIMINATION CASES: 1996, at 541 (Nancy E. Smith ed., 1996); *Report and Recommendations of the Dunlop Commission on the Future of Worker-Management Relations, in* LITIGATING EMPLOYMENT DISCRIMINATION CASES: 1996, at 549 (Nancy E. Smith ed., 1994); *Equal Employment Opportunity Commission's Alternative Dispute Resolution Policy Statement, in* LITIGATING EMPLOYMENT DISCRIMINATION CASES: 1996, at 563 (Nancy E. Smith ed., 1995); EEOC v. River Oaks Imaging, 67 FEP 1243 (S.D.Tex. 1995).

64. *Gilmer*, 500 U.S. at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

65. *See Gilmer*, 500 U.S. at 30.

66. *See id.*

67. *See id.* at 31.

68. *See id.*

69. *See id.* at 32.

70. *Id.* at 33.

71. *See id.* at 30. The Court stated "[w]e decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators." (quoting Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 634 (1985)).

72. *See Gilmer*, 500 U.S. at 30 (1991).

73. *See id.* at 31.

74. *See id.*

75. *See id.* at 31-32.

76. *See id.* at 32. The Court held "arbitrators do have the power to fashion equitable relief." *Id.*

77. *See id.*

78. *Gilmer*, 500 U.S. 20.

79. *See id.* at 34.

addition, the Court noted that *Alexander* was not decided under the FAA.[80] The *Gilmer* Court did not overrule *Alexander* but rather distinguished its decision.[81] However, several courts have interpreted Gilmer as overruling *Alexander* in its entirety.[82]

III. LEGISLATION

A. *The FAA*

The FAA was enacted for the purpose of moving the "parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."[83] The FAA "evidences a strong federal policy favoring the enforcement of arbitration agreements.[84] Section 2 of the FAA "is a congressional declaration of a liberal policy favoring arbitration agreements . . . ."[85] The much contested debate, however, is over Section 1 of the FAA.[86] Many have argued this Section excludes all employment contracts.[87] "Read narrowly, the exclusion refers only to employees involved in actual interstate transportation. Read broadly, the exclusion encompasses all employees involved in interstate com-

---

80. *See Gilmer*, 500 U.S. at 35 (1991).

81. The *Gilmer* Court recognized the fact that *Alexander* involved a collective bargaining agreement. Therefore, the Court expressed the differences between that case and the case before them. *See id.* at 33-34.

82. *See* Malin, *supra* note 10, at 84. Malin noted the Fourth Circuit has read *Gilmer* as overruling Gardner-Denver in Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996). *See also*, Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482; Rojas v. TK Communications, Inc., 87 F.3d 745 (5th Cir. 1996); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991).

83. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22 (1982).

84. United Nuclear Corp. v. General Atomic Co.,597 P.2d 290 (N.M. 1979), *cert. denied* 444 U.S. 911 (1979). *See also,* Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 626 (1984). The Court in Mitsubishi Motors stated:

> [Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration . . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Id. (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25).

85. *Moses H. Cone Mem'l Hosp.*, 460 U.S. 1, 24 (1982). Section 2 of the FAA provides as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be *valid, irrevocable, and enforceable*, save upon such grounds as exist at law or equity for the revocation of any contract.

9 U.S.C. § 2 (1987)(emphasis added).

86. 9 U.S.C. Section 1 provides as follows:

> "Maritime transactions", as herein defined, means charter parties, bills of lading water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collision, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or Territory or foreign nation, *but nothing herein shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.*

9 U.S.C. § 1 (1987)(emphasis added).

87. Malin, *supra* note 10 at 88.

merce."[88] Although the courts are split on this subject,[89] the definite trend is that the exclusion be read narrowly.[90]

The leading case on this issue is *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am.*[91] This case involved a controversy between a manufacturing corporation and its labor union.[92] The Court attempted to determine the meaning Congress intended behind the phrase "workers engaged in foreign or interstate commerce."[93] The question presented was whether "it intended to include only those employees actually engaged in the channels of interstate or foreign commerce or did it comprehend all those engaged in activities affecting such commerce, such as the production of goods destined for sale in it."[94] The Court looked to the legislative history behind Section 1 of the FAA[95] and determined since both classes of workers excluded, seaman and railroad employees,[96] were "engaged directly in interstate or foreign commerce,"[97] "only those other classes of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it"[98] should be included in the Section 1 exclusion.[99]

The courts have gone to great lengths to interpret Section 1 narrowly.[100] The most far-reaching case is *Kropfelder v. Snap-On Tools Corp.*[101] In this case, the plaintiff was a stockroom warehouseman "which received and sent goods from and into interstate commerce."[102] Although this court found that the plaintiff had a "strong, close, and rather immediate contact" with those involved in interstate commerce, he was not directly involved in the transportation business.[103] Obviously, this court read the Section 1 exclusion very narrowly. In discussing the exclusion, the court did address the broad interpretation that the defendant thought should be used by acknowledging that "if Congress

88. *Id.*
89. *See id.*
90. *See e.g.*, Tenney Eng'g Inc. v. United Elec. Radio & Mach. Workers of Am., 207 F.2d 450 (3d Cir. 1953); Miller Brewing Co. v. Brewery Workers Local Union, 739 F.2d 1159 (7th Cir. 1984); Kropfelder v. Snap-On Tools Corp., 859 F. Supp. 952 (D.Md. 1994). All of these cases held that the Section 1 exclusion of the FAA was limited to workers employed in the transportation industries.
91. *Tenney Eng'g Inc.*, 207 F.2d at 450.
92. *See id.* at 451.
93. *Id.* at 452.
94. *Id.*
95. The Court cited a report of the American Bar Association in which it was stated:
Objections to the bill were urged by Mr. Andrew Furuseth as representing the Seamen's Union, Mr. Furuseth taking the position that seamen's wages came within admiralty jurisdiction and should not be subject to an agreement to arbitrate. In order to eliminate this opposition, the committee consented to an amendment to Section 1 as follows: 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce.'
Id. at 452 (citing 48 A.B.A. REP. 287 (1923)).
96. *See* 9 U.S.C. § 1 (1987).
97. Tenney Eng'g Inc. v. United Elec. Radio & Mach. Workers of Am., 207 F.2d 450, 452 (1953).
98. *Id.*
99. *See id.*
100. Malin, *supra* note 10, at 89-90.
101. Kropfelder v. Snap-On Tools Corp., 859 F. Supp. 952 (D.Md. 1994).
102. *Id.* at 952.
103. *Id.* at 958.

had wanted to excluded [sic] all employment contracts from the Act, it could simply have said 'employment contracts' and left it at that."[104] The case law is clear that the majority of the circuits which have decided this issue are in agreement that Section 1 of the FAA excludes "only contracts of employment for workers 'actually in the transportation industries'" or engaged in the actual movement of goods in interstate commerce.[105]

Once it is established that a case falls within the scope of the FAA, the instructions of the FAA are clear. The FAA provides "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable."[106] The next major controversy arises within this section. Although there is no problem with any interpretation of this section, the controversy arises when trying to apply this section to Title VII cases.[107] Accordingly, the next section will discuss the legislative intent behind Title VII in regard to arbitration in an attempt to reconcile it with the FAA.

B. Title VII of the Civil Rights Act

Congress enacted Title VII to promote equality in the workplace.[108] Title VII makes unlawful discriminatory employment practices based on an individual's "race, color, religion, sex, or national origin."[109] It is also unlawful under Title VII to discriminate against an employee for opposing unlawful employment practices.[110] The intent of the act to dispose of discriminatory

---

104. *Id.* at 956.

105. Hampton v. ITT Corp., 829 F. Supp. 202, 203 (S.D.Tex. 1993). In agreement with this analysis are the Second, Third, Fourth, and Seventh Circuits. *See id.* The cases include Signal-Stat Corp. v. United Elec. Radio & Mach. Workers, 235 F.2d 298, 302 (2d Cir. 1956), *cert. den.*, 354 U.S. 911 (1957); Erving v. Va. Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972); Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1162 (7th Cir. 1984), *cert. den.*, 469 U.S. 1160 (1985); Tenney Eng'g Inc. v. United Elec. Radio & Mach. Workers of Am., 207 F.2d 450, 452-53 (3d Cir. 1953).

106. 9 U.S.C. § 2 (1987).

107. *Mandatory Arbitration of Statutory Employment Disputes*, 109 HARV. L. REV. 1670, 1676 (1996). Although this article refers to the contradictions between the FAA and ADA, the analogy is the same in that the ADA and Title VII has substantially the same legislative history in this regard.

108. *See* Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

109. 42 U.S.C. § 2000e-2 (1994). That section provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges, of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1994).

110. *See* 42 U.S.C. § 2000e-3 (1994). That section provides:

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.

It shall be unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employ-

practices is clear on its face. "Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color religion, sex, or national origin."[111] In addition, "Congress indicated that it considered the policy against discrimination to be of the 'highest priority.'"[112] However, what is not clear on its face is whether a claim brought under this act is subject to mandatory arbitration under the FAA.[113]

As stated above, Congress did not include an express provision under Title VII to exclude mandatory arbitration.[114] However, it is very clear from the legislative history of Title VII that even though Congress was in favor of voluntary alternative dispute resolution methods, it had no intent for arbitration of Title VII claims to be mandatory.[115] This intent is established in a house report which provided in pertinent part:

> [T]he use of alternative dispute resolution mechanisms is intended to supplement, not supplant the remedies provided by Title VII. Thus, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII.[116]

This policy against mandatory arbitration clearly contradicts the liberal policy favoring arbitration under the FAA.[117]

The Supreme Court has addressed this issue in dicta, but not directly.[118] As discussed earlier, in *Alexander*, the Court discussed the issue of arbitration in the context of Title VII extensively. The Court recognized the legislative history behind Title VII.[119] It also focused on the important purpose of Title VII and stated "that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal."[120]

The Court further expanded on other reasons for not upholding mandatory arbitration agreements in Title VII cases. First, the Court pointed out that most arbitrators are not familiar with the law and their competence is specialized in the "law of the shop, not the law of the land."[121] For this reason, the Court

---

ment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceedings, or hearing under this subchapter.

42 U.S.C. § 2000e-3 (1994).

111. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)), and *Griggs*, 401 U.S. at 429-430.

112. *Alexander*, 415 U.S. at 47 (quoting Newman v. Piggie Park Enter., 390 U.S. 400, 402 (1968)).

113. *See* 42 U.S.C. §§ 2000e-1 to 2000e-17 (1994).

114. *See id. See also, Alexander*, 415 U.S. at 47.

115. *See supra* note 15 and accompanying text.

116. *Id.*

117. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

118. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

119. *See Alexander*, 415 U.S. 36 at 48.

120. *Id.* at 56.

121. *Id.* at 57.

stated "the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII."[122]

The Court then attacked the arbitration procedure.[123] It focused on the factfinding process and stated this process in an arbitration procedure was not equivalent to the process in a judicial proceeding.[124] The factfinding process during arbitration is not as complete because "the usual rules of evidence do not apply; and the rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable."[125] The Court recognized that it was the informality of arbitration that makes it an "efficient, inexpensive, and expeditious means for dispute resolution,"[126] but pointed out that "[t]his same characteristic . . . makes arbitration a less appropriate forum for final resolution of Title VII issues than federal courts."[127]

The Court did consider a deferral rule[128] which would allow deferral of the matter to the arbitration. However, the Court felt that to adhere to a standard which protected the policies and rights behind Title VII would "make arbitration a procedurally complex, expensive, and time-consuming process."[129] The Court further stated "enforcement of such a standard would almost require courts to make *de novo* determinations of the employees'

---

122. *Id.*
123. *See* id.
124. *See* id.
125. *Id.* at 58 (quoting Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 (1956)).
126. Alexander v. Gardner-Denver Co., 415 U.S. 36, 58 (1974).
127. *Id.* In addition, the Court stated:

> Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. [T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. . . . Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.
>
> Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. And as this Court has recognized, "[a]rbitrators have no obligation to the court to give their reasons for an award."

Malin, *supra* note 10, at 79 n.6 (quoting *Alexander*, 415 U.S. at 56-68 (citations and footnotes omitted)).

128. The deferral rule was set forth in Rios v. Reynolds Metal Co., 467 F.2d 54 (5th Cir. 1972). It was an attempt to provide a means to defer Title VII cases to mandatory arbitration in a fair manner. The deferral rules provided the following:

> First, there may be no deference to the decision of the arbitrator unless the contractual right coincides with rights under Title VII. Second, it must be plain that the arbitrator's decision is in no way violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court must be satisfied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under the collective agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbitral hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities. The burden of proof in establishing these conditions of limitation will be upon the respondent as distinguished from the claimant.

Alexander, 415 U.S. at 58-59 n.20.
129. *Id.* at 59.

claims."[130] As such, the Court was uncertain "whether any minimal savings in judicial time and expense would justify the risk to vindication of Title VII rights."[131] The Court also feared such a deferral rule would adversely affect the arbitration system.[132]

III. THE STATUS OF THE ISSUE

A. *The Status of the Issue After Alexander but Prior to Gilmer*

After *Alexander*, almost all of the courts relied on the dicta in *Alexander* to deny mandatory arbitration in Title VII cases.[133] One of the leading cases after *Alexander* was *Swenson v. Management Recruiters Int'l, Inc.*[134] The Eighth Circuit adhered to the Supreme Court's findings as to the legislative intent of Title VII and the problems which would be involved by submitting Title VII claims to mandatory arbitration.[135] In addition, this court "concluded that arbitration under the FAA was not intended to supersede federal judicial remedies under Title VII."[136] Based on this language, it is obvious that although there is a conflict between the legislative history of Title VII and the FAA, the Eighth Circuit Court of Appeals found Title VII should supersede the FAA.[137]

In *Utley v. Goldman, Sachs & Co.*,[138] the First Circuit also relied heavily on *Alexander* in holding an employee is not required to submit a Title VII claim to binding arbitration.[139] The defendant in that case urged the Court to at least require arbitration prior to allowing the plaintiff to proceed in a judicial forum.[140] This court not only relied on *Alexander,* but further expounded on constitutional guarantees by stating "that Title VII 'contained an express private right of action, . . . and involved adjudication of the rights of an individual under the constitution, an inquiry that, with all due respect to arbitration, has historically been the sole province of Article III adjudication."[141]

In addition to the First and Eighth Circuits, many of the district courts have also relied on *Alexander* to find arbitration agreements in Title VII cases

130. *Id.*
131. *Id.*
132. *See id.*
133. *See* Bierdeman v. Shearson Lehman Hutton, Inc., 744 F. Supp. 211 (N.D.Cal. 1990); Borenstein v. Tucker & R.L. Day, Inc., 757 F. Supp. 3 (D.Conn. 1991); Jacobsen v. ITT Fin. Serv. Corp., 762 F. Supp. 752 (E.D.Tenn. 1991); Utley v. Goldman Sachs & Co., 883 F.2d 184 (1st Cir. 1989); Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304 (8th Cir. 1988).
134. *Swenson*, 858 F.2d 1304.
135. *See id.* at 1307.
136. *Id.*
137. *See id.*
138. *Utley*, 883 F.2d 184 (1989).
139. *See Utley*, 883 F.2d at 185.
140. *See id.*
141. *Id.* at 187 (quoting Page v. Moseley, Hallgarten, Estabrook, and Weeden, Inc., 806 F.2d 291, 297 (1st Cir. 1986)).

unenforceable. In *Borenstein v. Tucker & R.L. Day, Inc.*,[142] the court held "there can be no prospective waiver of an employee's rights under Title VII."[143] At the time of this decision, the Fourth Circuit had held in favor of arbitration in the context of an ADEA.[144] Although, this court disagreed with the Fourth Circuit, it also distinguished *Gilmer*.[145] The court found the arbitration procedures of the Securities Exchange Commission were very extensive to ensure the adequacy of arbitration procedures.[146] The court noted, however, that those safeguards were lacking in most Title VII cases.[147]

Another district court case decided after the Fourth Circuit's decision in *Gilmer* but prior to the Supreme Court's decision is *Bierdeman v. Shearson Lehman Hutton, Inc.*[148] In that case, the court distinguished *Gilmer* by stating that the reasoning behind *Gilmer* would not apply to Title VII claims because the legislative intent behind Title VII was different from that of the ADEA.[149] The court recognized the legislative intent behind Title VII which would preclude arbitration.[150]

B. The Status of the Issue After Gilmer

Although a few district courts have distinguished *Gilmer* and held against binding arbitration in Title VII cases,[151] the majority of the circuit courts and district courts have relied on *Gilmer* as authority for allowing binding arbitration in Title VII cases.[152]

---

142. *Borenstein*, 757 F. Supp. 3.

143. *Id.* at 4 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52 (1973)).

144. *See id.* at 4.

145. Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195 (4th Cir. 1990).

146. *See Borenstein*, 757 F. Supp. at 5.

147. *See id.* The court noted the factors against arbitration in the context of a Title VII claim:

> First, arbitral boards do not have the power to award broad equitable relief which courts have under 42 U.S.C. § 2000e-5(g). They cannot, for example, enjoin employers from engaging in future acts of discrimination. The power of the arbitrators is limited solely to the parties and the grievances before them. Thus, arbitration would not satisfy the policy concerns behind the Title VII legislation. Further, no statutory provision gives the EEOC the power to affect the arbitration procedure. In this respect it is unlike the Securities Exchange Commission ("SEC") referred to by the courts in *Shearson* and *Gilmer*. While the SEC has been given expansive power to ensure the adequacy of the arbitration procedures employed by the self-regulatory agencies such as the national securities associations, no such power has been given to the EEOC.

Id. at 5-6 (citations omitted).

148. Bierdeman v. Shearson Lehman Hutton, Inc., 744 F. Supp. 211 (N.D.Cal. 1990).

149. *See id.* at 214.

150. *See id.* The court stated:

> For example, in *Gilmer*, the Fourth Circuit noted that an arbitration agreement would be unenforceable where "Congress has evinced an intent to preclude waiver of the judicial forum for a particular statutory right." 895 F.2d at 197 (4th Cir. 1990). While the Fourth Circuit found no indication of such Congressional intention with respect to ADEA, the Supreme Court found that such intention exists with respect to Title VII claims. Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52 (1973). Thus, we do not find the Fourth Circuit's decision in *Gilmer* persuasive on the question of whether arbitration of Title VII claims should be compelled.

151. *See, e.g.*, Tarrant v. UPS, Inc., 1994 WL 30552 (N.D.Ill. 1994); EEOC v. River Oaks Imaging, 67 FEP Cases 1243 (S.D.Tex. 1995).

152. *See, e.g.*, Prudential Ins. Co. of America v. Lai, 42 F.3d 1299 (9th Cir. 1994); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992); Rojas v. TK Communications, Inc., 87 F.3d 745 (5th Cir. 1996); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d (10th Cir. 1994).

Probably the most important case since *Gilmer* and the most indicative of the Supreme Court's view on this issue is *Dean Witter Reynolds, Inc. v. Alford.*[153] The reason this case is so significant is that it was originally decided by the Fifth Circuit prior to *Gilmer.*[154] In that case, the Fifth Circuit determined, based on *Alexander*, that a Title VII claim could not be subject to binding arbitration.[155] Dean Witter subsequently petitioned the Supreme Court for Certiorari.[156] The Court granted certiorari and remanded the case back to the Fifth Circuit "for further consideration in light of *Gilmer v. Interstate/Johnson Lane Corporation.*"[157]

On remand, the Fifth Circuit held that "*Gilmer* requires us to reverse the district court and compel arbitration of Alford's Title VII claim."[158] Although, as discussed previously, some courts distinguished *Gilmer* from Title VII cases because it involved an ADEA claim, the Fifth Circuit held Title VII and the ADEA were both civil rights statutes and were both enforced by the EEOC.[159] Thus, they had "little trouble concluding that Title VII claims [could] be subjected to compulsory arbitration."[160] The Fifth Circuit stated that the policy arguments in *Alexander* were rejected by *Gilmer.*[161]

The Fifth Circuit more recently again held arbitration agreements enforceable in Title VII cases in *Rojas v. TK Communications, Inc.*[162] Here the plaintiff attempted to assert different arguments than those asserted in the previous cases. First, the plaintiff contended his employment agreement was excluded from the FAA.[163] However, the court rejected this argument and stated Congress did not intend to exclude all employment agreements under the FAA.[164] The plaintiff also contended that the contract was unconscionable.[165] The Court stated this was an attack on the entire agreement, not on the arbitration clause itself and, must therefore be heard by an arbitrator.[166] It is clear from a reading of this case that the Fifth Circuit favors binding arbitration in Title VII

153. *Alford*, 939 F.2d 229.
154. Alford v. Dean Witter Reynolds Inc., 905 F.2d 104 (5th Cir. 1990).
155. *See* id. at 105.
156. Dean Witter Reynolds Inc., v. Alford, 500 U.S. 930 (1991).
157. *Dean Witter Reynolds, Inc.*, 500 U.S. at 930.
158. *Alford*, 939 F.2d at 229-30.
159. *See id.* at 230.
160. *Id.*
161. *Alford*, 939 F.2d at 230. The Court stated specifically:

> Any broad public policy arguments against such a conclusion were necessarily rejected by *Gilmer.* Our prior decision stemmed mainly from our reading of the Supreme Court's unanimous decision in *Alexander v. Gardner-Denver Co.* . . . which held that "federal courts have been as signed plenary powers to secure compliance with Title VII" and that "[t]here is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an Individual's right to sue or divests federal courts of jurisdiction.

Id. (quoting Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104, 106 (5th Cir. 1990). The Court further stated "[t]his rejection of *Alexander* is especially forceful because the stockbroker-employee in *Gilmer* 'vigorously asserte[d]" that *Alexander* 'preclude[d] arbitration of employment discrimination claims." . . . Moreover, *Gilmer* rejected *Alexander's* mistrust of the arbitral process.'" *Id.*
162. Rojas v. TK Communications, Inc., 87 F.3d 745 (5th Cir. 1996).
163. *See id.* at 747.
164. *See id.* at 748.
165. *See id.* at 749.
166. *See id.*

cases.

The Ninth Circuit has also addressed the issue of binding arbitration in Title VII cases. In *Mago v. Shearson Lehman Hutton, Inc.*,[167] the court also followed *Gilmer* in holding Title VII cases to be subject to binding arbitration.[168] The court stated Mago had the burden of showing "that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue."[169] The court concluded Mago had not met this burden. It is unclear from the text whether Mago submitted the legislative history of Title VII previously discussed,[170] since the legislative history of Title VII is not discussed in the text.

Although the Ninth Circuit has held in favor of arbitration in Title VII cases,[171] it has also held in *Prudential Ins. Co. of Am. v. Lai*, the employee must knowingly forego statutory remedies.[172] The plaintiff signed a U-4 form containing an agreement "to arbitrate any dispute, claim or controversy that . . . is required to be under the rules, constitutions, or bylaws of the organizations with which I register."[173] The court held this provision could not in itself bind a plaintiff to arbitrate any particular dispute.[174] The key factor to note about this case is that it did discuss the legislative history behind Title VII.[175] In doing so, the court found there was a "congressional concern" that Title VII disputes be arbitrated only "where appropriate," and only when such a procedure was knowingly accepted."[176] The court stated "[t]his is a policy that is at least as strong as our public policy in favor of arbitration."[177] Thus, the court concluded "that a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration."[178] Although this court did not specifically state that the arbitration clause must refer to Title VII cases, it left the impression that it would be wise to do so.[179]

---

167. Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992).

168. *See id.* at 935.

169. *Id.* The court stated that "if such an intention exists, it will be deductible from the text of Title VII, its legislative history, or an 'inherent conflict' between arbitration and the underlying purposes of Title VII." *Id.*

170. *See supra* note 15 and accompanying text.

171. *See Mago*, 956 F.2d at 932.

172. Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994).

173. *Id.* at 1301.

174. *See id.* at 1302.

175. *See id.* at 1304-05.

176. *Id.* at 1305.

177. *Id.*

178. *Id.* The court reasoned:

> Although the Supreme Court has pointed out that plaintiffs who arbitrate their statutory claims do not 'forego the substantive rights afforded by the statute,' . . . the remedies and procedural protections available in the arbitral forum can differ significantly from those contemplated by the legislature. In the sexual harassment context, these procedural protections may be particularly significant.

Id.

179. *See id.* In regard to this particular contract, the court stated:

> In this case, even assuming that appellants were aware of the nature of the U-4 form, they could not have understood that in signing it, they were agreeing to arbitrate sexual discrimination suits. The U-4 form did not purport to describe the types of disputes that were to be subjected to arbitration. Moreover, even if appellants had signed a contract containing the NASD arbitration clause, it would

IV. ALTERNATIVES

Arbitrability of Title VII claims is an issue the Supreme Court needs to decide. There are several ways the Court could rule. As stated in many of the pre-*Gilmer* decisions, the Court could easily hold the legislative history of Title VII[180] precludes arbitration. In ruling against arbitration, however, the Court may be denying claimants a more favorable forum to adjudicate their claim. Arbitration has become a means to settle disputes in a speedy, efficient, and inexpensive manner,[181] and this forum may be more favorable to some claimants.[182]

As previously discussed, the Court could adopt some type of deferral rule. One deferral rule was discussed in the *Alexander* case. Under the deferral rule, the contractual rights must coincide with the rights under Title VII, and the decision must not violate the rights guaranteed by Title VII.[183] In addition, the Court must be satisfied that the issues before the Court were identical to those before the arbitrator, the arbitrator had the power to decide the issue, the evidence adequately dealt with the factual issues, the arbitrator decided the factual issues before the Court, and the arbitration proceeding was fair.[184]

The Dunlop Commission suggested that arbitration systems should meet "six key quality standards:"[185]

> [A] neutral arbitrator who knows the laws in question and understands the concerns of the parties; [A] fair and simple method by which the employer and employee can secure the necessary information to present his or her claim; [A] fair method of cost-sharing between the employer and employee to ensure affordable access to the system for all employees; [T]he right to independent representation if the employee wants it; [A] range of remedies equal to those available through litigation; A written opinion by the arbitrator explaining the rationale for the result; and Sufficient judicial review to ensure that the result is consistent with the governing laws.[186]

Although a deferral rule may seem the way to go, there are disadvantages. A deferral rule could easily turn the arbitration system into a second court sys-

---

not put them on notice they were bound to arbitrate Title VII claims.

Id.

180. *See supra* note 15 and accompanying text.

181. *See supra* note 2 and accompanying text.

182. As the Dunlop Commission noted, arbitration may be more favorable to litigation because:

> [T]he pursuit of a legal claim through litigation often proves stressful and unsatisfying. Overburdened federal and state judicial dockets mean that years often pass before an aggrieved employee is able to present his or her claim in court. The combative nature of litigation tends to push the employee to the sidelines in this legal struggle, though occasionally subjecting employees to detailed investigation of their personal histories and character.

The Report and Recommendations of the Dunlop Commission on the Future of Worker-Management Relations, supra note 63 at 553.

183. *See supra* note 128 and accompanying text.

184. *See supra* note 128 and accompanying text.

185. *The Report and Recommendations of the Dunlop Commission on the Future of Worker-Management Relations, supra* note 63, at 554.

186. *Id.* at 558.

tem.[187] In *Alexander*, the Court discussed the disadvantages of a deferral rule. The Court stated "a standard that adequately insured effectuation of Title VII rights in the arbitral forum would tend to make arbitration a procedurally complex, expensive, and time consuming process."[188] The Court also pointed out that enforcement of a deferral rule "would almost require courts to make *de novo* determinations of the employees' claims."[189]

The Court could also decide with the post-*Gilmer* decisions that Title VII claims are subject to binding arbitration.[190] However, in doing so the Court would be ignoring the clear legislative intent regarding arbitration in Title VII cases.[191]

The most logical decision for the Court would be to adopt the holding of the Ninth Circuit in *Prudential Ins. Co. of America v. Lai*. The Court should allow binding arbitration only in cases in which the claimant knowingly enters into an arbitration agreement.[192] Although the Ninth Circuit did not specifically address what would constitute "knowingly," the Supreme Court should find an arbitration agreement binding only in cases in which the agreement specifically refers to arbitration of Title VII claims.[193] If the Supreme Court were to follow the Ninth Circuit, the aims of the FAA[194] would be met and claimants would have the right to decide the most favorable forum in which to present their claims.[195]

V. CONCLUSION

The Supreme Court needs to grant certiorari to decide the fate of arbitration in the context of Title VII cases. The best route would be to adopt the Ninth Circuit's view and allow arbitration of Title VII disputes as long as the claimant knowingly enters into the agreement.[196]

Monica L. Goodman

---

187. *See id.*

188. Gilmer v. Interstate/Johnson Lane Corp., 415 U.S. 36, 59 (1973).

189. *Id.* The Court further stated "it is uncertain whether any minimal savings in judicial time and expense would justify the risk to vindication of Title VII rights. *Id.*

190. *See, e.g.*, Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299 (9th Cir. 1994); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1991); Rojas v. TK Communications, Inc., 87 F.3d 745 (5th Cir. 1996); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994).

191. *See supra* note 15 and accompanying text.

192. Prudential Ins. Co. of Am., 42 F.3d at 1301.

193. The court concluded that this arbitration agreement was not specific enough in that the claimant did not understand what she was agreeing to arbitrate. *See id.* at 1305. However, this court did not elaborate on what type of language should be included in a valid arbitration agreement. The court did specifically note there was nothing in the arbitration clause which communicated to the claimant that she was agreeing to arbitrate a Title VII claim. *Id.* Thus, the decision could be read as requiring arbitration clauses to specifically include language alerting claimants that they agree to arbitrate any and all claims under Title VII.

194. *See supra* notes 83 and 84 and accompanying text.

195. *See supra* note 182 and accompanying text.

196. *See supra* note 192-93 and accompanying text.